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Pawzi bin Sakup & Ors v Felcra Bhd & Ors

B HIGH COURT (KUCHING) — SUIT NO KCH-22NCvC-58/10 OF 2016
STEPHEN CHUNG J
27 APRIL 2018

C *Native Law and Custom — Land dispute — Native customary rights (NCR) over land — Claim for — Allegation that company had trespassed into native customary land — Burden of proof in proving trespass and encroachment — Whether native customary rights land proven to rightfully belonging to claimants — Whether sufficient evidence adduced to support claims*

D The plaintiffs sued on their own behalf and on behalf of their family, residents, occupiers and claimants of native customary rights ('NCR') over their land. The plaintiffs claimed that their forefathers migrated from the Sri Aman division to settle in their respective villages in the 1930s. According to the E plaintiffs, a subsidiary company of the first defendant, with the knowledge and consent of the second and third defendants, developed an oil palm plantation and this palm plantation had trespassed and encroached into their titled and NCR land. In the present claim, the plaintiffs sought for declarations that: (a) the plaintiffs acquired NCR and were the custom owners of the land; (b) the F defendants were precluded from impairing, abridging or interfering with the plaintiffs' land; (c) the first defendant had and continued to trespass on to the plaintiffs' land; (d) the act of the second and third defendants, in issuing the titles for the said lots to any person other than the plaintiffs over the plaintiffs' land was void or wrongful; and (e) the second and third defendants were G precluded from issuing any or any further titles to any person other than the plaintiffs over the plaintiffs' land. The defendants argued that the plaintiffs could not have acquired NCR over the area because it was given out for extraction timber to Hua Lim Sawmill Bhd. The first defendant counterclaimed against the plaintiffs and sought: (i) a declaration that the H sixth, seventh and eighth plaintiffs had trespassed onto certain parts of the land; and (ii) special and general damages against the sixth, seventh and eighth.

Held, dismissing the claim and counterclaim:

I (1) Under native customs in Sarawak, a native of Sarawak could create and acquire NCR over land by clearing virgin jungle and farming the land or inheriting the same from their ancestors. These customs have been codified in legislations in Sarawak. The burden was on the plaintiffs to prove, by cogent evidence, when and how they acquired or inherited their

NCR land, the exact location and size of the land and that their NCR subsisted. Bare assertions would not be sufficient (see paras 20–21).

(2) None of the plaintiffs' witnesses had carried out any field surveys of the NCR land claimed by the plaintiffs. Without any field survey carried out of the *kampungs* being present to point out the boundary and features of the NCR land claimed, the maps adduced could not be correct nor could they be used to substantiate the NCR claims of the plaintiffs (see para 36).

(3) Based on the evidence adduced, on a balance of probabilities, the plaintiffs failed to prove that their forefathers cleared, farmed and acquired NCR over the area of land claimed and that they inherited the NCR over the land claimed by them. They failed to establish their case against the defendants and for the reliefs prayed for (see para 54).

(4) The first defendant did not produce any photographs or video recordings to establish that the sixth, seventh and eighth plaintiffs had trespassed, threatened and harvested fresh fruit bunches ('FFB'). There was also no testimony on how many FFB were taken, the value of these FFB and the losses sustained by the first defendant. The first defendant did not call any of its workers to established that it was the sixth, seventh and eighth plaintiffs. Although the first defendant claimed for special damages, it did not set out the special damages in its defence and counterclaim. Therefore, the first defendant failed to establish its counterclaim against the sixth, seventh and eighth plaintiffs (see para 56).

[Bahasa Malaysia summary

Plaintif menyaman atas nama mereka sendiri dan bagi pihak keluarga, penduduk, penghuni dan pihak-pihak yang menuntut hak adat negeri ('HAN') atas tanah mereka. Plaintif mendakwa bahawa nenek moyang mereka berhijrah dari bahagian Sri Aman untuk menetap di kampung masing-masing pada tahun 1930-an. Menurut plaintif-plaintif, anak syarikat defendan pertama, dengan pengetahuan dan persetujuan defendan kedua dan ketiga, membangunkan ladang kelapa sawit dan ladang kelapa sawit ini telah memasuki dan menceroboh tanah mereka dan tanah HAN. Dalam tuntutan ini, plaintif memohon perisytiharan bahawa: (a) plaintif memperoleh HAN dan adalah pemilik tanah tersebut bawah adat; (b) defendan dihalang daripada merosakkan, mengasingkan atau berurusan dengan tanah plaintif; (c) defendan pertama telah dan terus menceroboh tanah plaintif; (d) perbuatan defendan kedua dan ketiga, dalam mengeluarkan hak milik bagi lot tersebut kepada mana-mana orang selain plaintif-plaintif atas tanah plaintif-plaintif adalah salah atau tidak sah; dan (e) defendan kedua dan ketiga dihalang daripada mengeluarkan apa-apa atau mana-mana hak milik selanjutnya kepada mana-mana orang selain daripada plaintif-plaintif atas tanah plaintif-plaintif. Defendan-defendan menghujahkan bahawa plaintif tidak memperoleh HAN

A atas kawasan tersebut kerana ini telah diberi, untuk membalak kayu, kepada Hua Lim Sawmill Bhd. Defendan pertama menuntut balas terhadap plaintif dan memohon: (i) deklarasi bahawa plaintif keenam, ketujuh dan kelapan telah mencerobohi bahagian-bahagian tertentu tanah; dan (ii) ganti rugi am dan khas terhadap plaintif keenam, ketujuh dan kelapan.

B

Diputuskan, menolak tuntutan dan tuntutan balas:

(1) Di bawah adat anak negeri di Sarawak, penduduk asli Sarawak boleh membentuk dan memperoleh HAN tanah dengan membersihkan hutan
C dara dan bercucuk tanam atas tanah atau mewarisinya daripada nenek moyang mereka. Adat-adat ini telah dikodifikasikan dalam undang-undang di Sarawak. Beban terletak pada plaintif-plaintif untuk membuktikan, dengan bukti yang jelas, bila dan bagaimana mereka memperoleh atau mewarisi tanah-tanah HAN mereka, lokasi dan saiz
D tanah dan HAN mereka. Dalihan semata-mata tidak mencukupi (lihat perenggan 20–21).

(2) Tiada seorang pun saksi plaintif-plaintif yang menjalankan sebarang tinjauan terhadap tanah HAN yang dituntut oleh plaintif-plaintif. Tanpa
E apa-apa kaji selidik tanah dijalankan terhadap kampung-kampung yang ada untuk menunjukkan sempadan dan ciri-ciri tanah HAN yang didakwa, peta yang dikemukakan tidak mungkin benar dan tidak boleh digunakan untuk membuktikan tuntutan HAN terhadap plaintif-plaintif (lihat perenggan 36).

F

(3) Berdasarkan keterangan yang dikemukakan, atas keseimbangan kebarangkalian, plaintif-plaintif gagal membuktikan bahawa nenek moyang mereka membersihkan, bercucuk tanam dan memperoleh HAN atas kawasan tanah yang dituntut dan bahawa mereka mewarisi HAN
G atas tanah yang dituntut oleh mereka. Mereka gagal membuktikan kes mereka terhadap defendan dan relif-relif yang dipohon (lihat perenggan 54).

(4) Defendan pertama tidak mengemukakan apa-apa gambar atau rakaman video untuk membuktikan bahawa plaintif keenam, ketujuh dan kelapan
H telah menceroboh, mengancam dan menanam tandanan buah-buahan segar ('FFB'). Tidak ada keterangan tentang mengenai berapa banyak FFB diambil, nilai FFB ini dan kerugian yang ditanggung oleh defendan pertama. Defendan pertama tidak memanggil mana-mana pekerja untuk menyatakan bahawa plaintif keenam, ketujuh dan kelapan yang
I melakukannya. Walaupun defendan pertama menuntut ganti rugi khas, ia tidak menyatakan ganti rugi khas dalam pembelaan dan tuntutan balasnya. Oleh itu, defendan pertama gagal membuktikan tuntutan balasnya terhadap plaintif keenam, ketujuh dan kelapan (lihat perenggan 56).]

Notes

For a cases on native customary rights (NCR) over land, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 798–799.

Cases referred to

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149, FC (refd)

Jusy ak Mesin & Ors v Pembinaan BLT Sdn Bhd & Ors [2013] 9 MLJ 543, HC (refd)

Ranggong ak Jenau & Ors v BLD Resources Sdn Bhd & Ors and another appeal [2017] 5 MLJ 700, CA (refd)

Sop Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors [2004] 4 MLJ 180, HC (refd)

Legislation referred to

Public Authorities Protection Act s 2
Land Code (Cap 81) ss 2, 5(1), (2), 10, 12, 13, 202
Sarawak Limitation Ordinance

Dominique Ng (Dominique Ng & Assoc) for the plaintiffs.
Anga John Lawrence (Ani Solep & Co Advocates) for the first defendant.
Emma Kati (State Attorney General's Chambers) for the second and third defendants.
Jezamine Dior (Dior and Co Advocates) for the fourth defendant.
Ateng Jeros (Jonathan Jalin with him) (Ateng Jeros & Co Advocates) for the fifth defendant.

Stephen Chung J:

[1] In this action the plaintiffs are suing on their own behalf and on behalf of their family, the residents, occupiers and claimants of native customary rights ('NCR') over their land situated at Kampong Semera, Kg Jemukan, Kg Jemukan Ulu and Kpg Terasi of Sadong Jaya, Asajaya, Samarahan, Sarawak.

[2] In para 4 of the statement of claim, the plaintiffs claimed that they have acquired NCR and are customary owners over the land between and around Sg Ulu Semera, Sg Ulu Jemukan and Kg Tarasi in particular over:

(a) for Kampong Semera at Ulu Semera:

(i) Lots 2–14, all of Block 22, Sadong Land District (13 lots);

(ii) Lot 41, lots 43–47, 64–79, all of Block 23 Sadong Land District (23 lots);

(iii) Lots 7–9, 12, 17, 20, 23, 26, 29, 36, 42, 44, 47, 49, 51, 53, 55, 57,

59, 61 and 63 all of Block 29 Sadong Land District (21 lots); and

(iv) Lots 2, 5, 6, 9, 10, 29–33, 37–39, 58–61, 63, 66, 69, 72, 75, 78, 81, 84, 87, 90, 112, 114, 115–117, 120, 121, 124, 127, 130, 133, 136, 137, 139–141, 186, 191–205 and 207, all of Block 30 Sadong Land District (60 lots).

The total area of land claimed approximated to 1146 acres or 463.7 hectares;

(b) for Kampong Jemukan, at Ulu Jemukan:

(i) Lots 9–39, all of Block 23, Sadong Land District (29 lots);

(ii) Lots 71–72, both go Block 24 Sadong Land District (two lots); and

(iii) Lots 14–26, all of Block 30 Sadong Land District (13 lots).

The total area of land claimed approximated to 625 acres or 253 hectares;

(c) for Jemukan Ulu:

(i) Lots 105–106, Block 31 Sadong Land District;

(ii) Lot 87, Block 38 Sadong Land District; and

(iii) Lots 42–49 (eight lots) and lot 140, Block 30 Sadong Land District.

The total area of land claimed approximated to 249 acres or 100.8 hectares; and

(d) for Kampong Terasi:

Lots 168 and 169, both of Block 31 Sadong Land District which approximated to 176 acres or 71.2 hectares.

[3] The first to fifth plaintiffs represented the villagers and claimants of Kg Semera, the sixth to eleventh plaintiffs represented the villagers and claimants of Kg Jemukan whereas the twelfth to fourteenth plaintiffs represented the villagers and claimants of Kg Terasi. The plaintiffs claimed that their forefathers migrated from the second division, or now known as Sri Aman Division, to settle in their respective villages in the 1930s, before the Japanese occupation. The plaintiffs claimed that a subsidiary company of the first defendant, with the knowledge and consent of the second and third defendants, developed an oil palm plantation known as Asajaya Estate over their land. The plaintiffs claimed that Asajaya Estate had trespassed and encroached onto their titled and NCR land.

[4] The plaintiffs claimed for:

(a) a declaration that the plaintiffs have acquired NCR and are the customary owners of their land;

(b) a declaration that the defendants, their employees, servants or contractors are precluded from impairing, abridging or interfering with the plaintiffs' land;

(c) a declaration that the first defendant, its employees, servants, agents or contractors have and continue to trespass onto the plaintiffs' land;

(d) a declaration that the act of the second and third defendants in issuing the titles for the said lots to any person other than the plaintiffs over the plaintiffs' land is void and or wrongful; and

(e) a declaration that the second and third defendants are precluded from issuing any or any further titles to any person other than the plaintiffs over the plaintiffs' land.

[5] The first defendant contended that its oil palm plantation known as Asajaya Estate Blok IV Pkt IV is located on what was registered as state land and that it entered into and developed the land into the oil palm plantation based on the approval given by the second and third defendants vide a letter dated 8 February 1996.

[6] The first defendant contended that since then the land lots in Asajaya Estate Blok IV Pkt IV with the exception of Lot 14 Block 30 Sadong Land District, Lot 72 Sadong Land District and Lot 31 Block 23 Sadong Land District have been alienated to persons who were and are the occupiers of the land lots and who are the project participants in the oil palm plantation. The first defendant contended that it had entered into arrangements or agreements with the project participants regarding the development of their land lots. In para 34 of the defence and counterclaim, the first defendant has set out the names of the registered owners of these several parcels of land. The first defendant contended that the plaintiffs should have sued these landowners as well.

[7] The first defendant complained that since 20 December 2012 the sixth, seventh and eighth plaintiffs and others have illegally entered, trespassed and without the permission of the first defendant harvested fresh fruit bunches ('FFB') from its oil palm plantation. The first defendant complained that in trespassing and unlawfully harvesting the FFB the plaintiffs had also threatened, harassed and obstructed the first defendant's workers and contractors from entering, maintaining and harvesting the FFB. The first defendant complained that the plaintiffs sold the FFB for profits and kept the proceeds. The first defendant claimed for the return of these proceeds.

[8] The first defendant counterclaimed against the plaintiffs, inter alia: (a) a declaration that the sixth, seventh and eighth plaintiffs, their workers, contractors, agents or representatives have since 20 December 2012 trespassed

Lots 9–39 all of Block 23 Sadong Land District; Lot 71 and Lot 72 both of Block 24 Sadong Land District; Lots 14–26 all of Block 30 Sadong Land District (13 lots) which include all the new land lots being part of Asajaya Estate Blok IV Pkt IV; and (b) for special and general damages against the sixth, seventh and eighth plaintiffs.

[9] The second and third defendants contended that NCR may only be created in accordance with the provisions of s 5(1) and (2) of the Sarawak Land Code and that the state has discretion to alienate land under s 13 of the Land Code.

[10] The second and third defendants denied that the plaintiffs have any NCR over the land claimed by them. The second and third defendants submitted that under s 12 of the Sarawak Land Code all land are vested in the state and are state land. The second and third defendants contended that at the material times the area of land claimed by the plaintiffs, or disputed area, was primary forest and there was no settlement within the disputed area.

[11] The defendants contended that the plaintiffs could not have acquired NCR over the area because it was given out for extraction of timber to Hua Lim Sawmill Bhd under Forest Timber License No T/5087 issued in 1971 which expired on 1 March 1972 and a new Forest Timber License No T/5107 issued on 1 March 1972 which expired on 30 April 2005.

[12] The defendants submitted that some of the lots claimed by the plaintiffs were claimed by others and which were surveyed under these claimants' names who have claimed the land as their land and who have been issued with documents of title to them. These land owners or claimants were not parties in this suit.

[13] The second and third defendants also submitted that the plaintiffs' claims for declaratory orders and for damages relating to the issuance of the provisional leases are barred by virtue of s 2 of the Public Authorities Protection Act, under s 202 of the Land Code and under the Sarawak Limitation Ordinance.

[14] Previously, the parties had filed suits in Suit KCH-22NCvC-23/4 of 2013, Suit KCH-22NCvC-24/4 of 2013, Suit KCH-22NCvC-72/12 of 2014(HC3) and Suit KCH-22NCvC-31/9 of 2015 (HC1) which were withdrawn. At the commencement of trial, two parties applied to intervene and were granted leave to become the fourth and fifth defendants in this suit. During case management, in the previous suits, and in this suit, the parties were aware of the fourth and fifth defendants who were also claimants over some of the land in the areas but the plaintiffs did not join them as parties and

did not seriously oppose their applications as interveners. There was no appeal against the decision to allow the fourth and fifth defendants to intervene in this suit.

[15] The fourth defendant contended that 65 villagers from Kg Jemukan, Asajaya claimed two parcels of land described as Lot 112 Block 31 and Lot 198 Block 24 of Sadong Land District, subsequently described as Lot 168 and Lot 169 of Block 31 of Sadong Land District, as their NCR land.

[16] The fourth defendant submitted that by a deed of relinquishment and acquisition, dated 30 November 2006, the 65 villagers agreed to relinquish their rights and agreed to sell the two parcels to one Wahab bin Ismail, a director of the fourth defendant which applied for the document of title to be issued to the fourth defendant which became the registered proprietor of both parcels of land. The fourth defendant submitted that it has indefeasible title over the two parcels of land. Since then the fourth defendant has developed the two parcels into an oil palm estate. The plaintiffs disputed the claims and contended that these two parcels are their NCR land.

[17] The fifth defendant consists of four claimants representing 200 claimants from Kg Sg Buluh, Sadong Jaya, Asajaya. They claimed that they have acquired NCR over their land in Blocks 22, 23, 29 and 30 of Sadong Land District and the several lots of land claimed by them which are particularised and set out in para 4.6 of the amended defence of the fifth defendant. The fifth defendant disputed that the plaintiffs had occupied and or had acquired NCR over these several parcels of land. They contended that the plaintiffs, in particular the ninth, tenth and eleventh plaintiffs did not have a cause of action against the defendants as to ownership or trespass in respect their land.

[18] The fifth defendant contended that the second and third defendants have approved their claims to these parcels of land but the documents of title have yet to be issued to them. They contended that they were invited to participate in the oil palm scheme developed by the first defendant at Asajaya. The fifth defendant contended that they subsequently entered into agreements with the first defendant for their land to be developed to be part of the Asajaya Estate Blok IV Pkt IV. It should be noted that the plaintiffs did not sue or claimed against the fifth defendant in this suit.

[19] Pursuant to para 4 of the statement of claim, the plaintiffs claimed communal and individual parcels of land which they claimed to be their NCR land. The plaintiffs referred to the write-ups of the history of their settlements and the land claimed by them prior to 1949 (see pp 13–31 BOD3). The plaintiffs did not call the makers of these write-ups or community leaders to confirm the truths of these assertions. It was not in dispute that the plaintiffs

and their forefathers have settled and lived in the areas for many years and there are some NCR land belonging to or claimed by others in the area. Based on the pleadings, there are overlapping claims by others including the fifth defendant representing 200 claimants from Kg Sg Buluh, Sadong Jaya. The question is whether the plaintiffs have acquired or inherited NCR over the land claimed by them.

[20] Under native customs in Sarawak, a native of Sarawak can create and acquire NCR over land by clearing virgin jungle and farming the land or inheriting the native customary land from their ancestors. These customs have been recognised and codified in legislations in Sarawak. Section 2 of the Sarawak Land Code defines 'Native Customary Land' to include land in which native customary rights, whether communal or otherwise, have lawfully been created prior to 1 January 1958, and still subsists as such. Under s 5(1), as from 1 January 1958, NCR may be created in accordance with the native customary law of the community concerned by any of the methods specified in s 5(2), if a permit is obtained from the Superintendent of Lands and Surveys under s 10: see *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; *Ranggong ak Jenau & Ors v BLD Resources Sdn Bhd & Ors and another appeal* [2017] 5 MLJ 700.

[21] The burden is on the plaintiffs to prove by cogent evidence when and how they acquired or inherited their NCR land, the exact location and size of the land and that their NCR subsists. Bare assertions would not be sufficient: see *Sop Plantations (Suai) Sdn Bhd v Ading ak Layang & Ors* [2004] 4 MLJ 180; *Jusy ak Mesin & Ors v Pembinaan BLT Sdn Bhd & Ors* [2013] 9 MLJ 543.

[22] The seventh plaintiff (PW1) testified that the sixth to 11th plaintiffs represented the people of Kg Jemukan. He said he is a Malay and a native of Sarawak and his late father Jana bin Sapiee was the fourth Ketua Kampong of Kampong Jemukan who was appointed on 2 December 1985 until he passed away in 2016. He said his father succeeded Ketua Kaum Dola bin Makanun who was preceded by Ketua Kampong Hamdan bin Kadir and Ketua Kampong Kaha bin Said.

[23] PW1 said he was born and raised in Kampong Jemukan and their NCR land have been worked since before his late father's birth, thus creating a concrete base that the NCR land belonged to them. He said his family has lived in Kampong Jemukan for more than four generations which was before the Japanese occupation. According to his late father, his father at the age of eight used to follow his late grandfather to a plot of land in the upper reaches of Sungai Ulu Jemukan accessible by 'sampan' when it was high tide which took

about 20 minutes or by foot which took more than an hour. They would work on the land farming the same crops that were planted by their forefathers.

[24] The sixth plaintiff (PW2), from Kpg Jemukan, testified that his grandfather and his brothers were the original settlers of Kg Jemukan and they owned Lots 36, 39, 40 and 41 shown in the ancient map which showed the division of land between the villagers as approved by Ketua Kampung Kahar on 20 February 1949. The ninth plaintiff, from Kg Jemukan, gave similar evidence about their kampung and their land.

[25] PW5 testified that he is from Kg Semera and one of the claimants of the land in Kg Semera but he is not one of the named plaintiffs. He gave a brief history of their kampung and their land. Apart from Lot 136 Block 17 Sadong Land District which is registered in his name, he did not identify or claim any other parcel of land as belonging to him.

[26] The 12th plaintiff (PW6), an Iban, testified that he is the current Ketua Kampung of Kpg Terasi. He gave a brief history of their kampung and their NCR land. He did not identify any specific parcel(s) of land claimed or belonging to him or his family.

[27] PW1 said his father kept a copy of a cadastral map (pp 1–2 of BOD2), a map of Sadong Land District Block 24 obtained from the Lands and Surveys Department, Samarahan (L&S) (pp 6–8 BOD2) and an 'Ancient Map' (exh P6 at p 32 BOD3) showing their NCR land. It was contended that it was Encik Zaini of L&S who settled the claims in respect of the land and issued the map to Hj Muhammad on or before 20 February 1949. PW3 said the seventh plaintiff (PW1) told him that PW1 had in September, 2017 found a D-Book from a locked cabinet of his late father. A D-Book contains record of land which has been surveyed by the L&S with their locality, bearings, size or measurements, diagrams of field lots with names of claimants, sometimes including information of *temuda*, old jungle and *paya bakau*.

[28] However, PW1 did not in his witness statement testify on the discovery of the D-Book and he did not explain why he took so long to discover the D-Book although his father passed away in 2016. PW1 did not say from where his father obtained or found the cadastral map, the ancient map or the D-Book or the source and veracity of these documents. He did not know Encik Zaini or Hj Muhammad or their full name or whether they were still alive. None of the plaintiffs or witnesses claimed to be a descendant of Hj Muhammad. PW1 did not know the maker of these documents and they were not called to testify as to the truth or accuracy of these documents.

[29] The date '20.2.49' in the ancient map was handwritten together with some writings in jawi, without any translation thereof. There was no evidence who, and when, wrote this date and the writings in jawi in the ancient map and as to the truth or veracity of this map. These were hearsay. This date '20.2.49' could not be used to substantiate their claims that their forefathers or ancestors had cleared and acquired NCR over the area of land in 1949 or prior to 1949 or prior to 1958.

[30] PW1 asked PW3 to prepare superimposed maps of the area claimed by them as 'K2' (p 31 BOD3) and 'K3' (p 30 BOD3) based on the cadastral map, 'Ancient Map' and D-Book. PW3 was a teacher and not one of the plaintiffs. He was not from Kg Jemukan or Kg Semera or Kg Terasi. He testified that he was asked to be a witness for the plaintiffs in this action because he was related to the late Ketua Kampong Jana bin Sapiee.

[31] PW3 said that he took a short course with SADIA on GPS reading, mapping and learned to read maps, positioned pegs on maps, do superimposed maps and has experience with computer applications such as JPEG and with Photoshop. He prepared K2 and K3 and another superimposed map HD2 based on the D-Book, cadastral map and ancient map. PW3 has no personal knowledge of the NCR claims of the plaintiffs or those of the defendants yet in Q&A8 of his witness statement he said that the plaintiffs were the genuine NCR owners of the NCR land which have been taken by Felcra without their permission. It should be noted that PW3 is not a qualified cartographer or surveyor. His maps K2, K3 and HD2, based on the D-Book, cadastral map and the ancient map, were based on hearsay materials which could not be verified or correct. In particular K2, K3 and HD2 could not be used to substantiate the claims of the plaintiffs that they had acquired and or inherited NCR over the land.

[32] PW1 then refer to a gazette notification published on 27 July 1956 (see pp 4–5 of BOD1) which states that the several parcels of land in Kg Semera, Kg Jemukan, Kg Terasi and other kampongs stated therein constituted native communal reserve and asserted that this proved that they had acquired NCR over the land. However the *gazette* refers to Blocks 7 and 8 and not to Blocks 22, 23, 29 and 30 of Sadong Land District as pleaded to belong to them. The seventh plaintiff did not identify which parcel(s) of land to belong to him or his family or that their land came within the native communal reserve described in the *gazette* notification. He did not identify the owners of the parcels of land claimed by the people of Kg Jemukan pleaded in para 4(a)(i)–(iv). He did not say the several parcels of land in Block 7 and 8 in Kg Jemukan belonged to Kg Jemukan. The *gazette* did not support his averment that they had acquired NCR over their land in Kg Jemukan as pleaded in para 4 of the statement of claim.

[33] The plaintiffs called PW10 to testify, who was the manager and Geography Information System and Remote Sensing Officer with the Dayak Nation Institute. He took a course 'SSR 3054 Remote Sensing and Geographical Information System' in his third year at Unimas and had exposure to geographic information system (GIS), the computer system used for capturing, storing, analyzing and displaying geographic data. He joined Sadia in 2011 and was given on-the-job training by Mark Bujang of Borneo Resource Institute of Malaysia (BRIMAS) on how to operate a global positioning system (GPS) device for field surveys. He took two courses in 2011 and 2014 for completing Introduction to ESRI ArcGIS 10.1 and ESRI ArcGIS 10.1 as a tool for spatial analysis and advocacy. He said he has been working with GIS and producing more than 50 community and individual maps using GIS for more than seven years.

[34] He said the community approached him to do field surveys and to map the boundary of the NCR land of Kg Jemukan, Kg Semera and Kg Terasi Iban. He did not mention Kg Terasi or Kg Terasi Melayu which is a different or separate village. It was obvious because none of the plaintiffs represented Kg Terasi Melayu in this suit. PW10 said he used a hand held Garmin GPS device in the survey to take coordinate points. The data was later analysed and converted to decimal degrees using Microsoft Excel spreadsheet. For the map showing the native customary land of the plaintiffs, he outlined the area of the pulau and inserted the important landmarks such as *kebun, tempat menjerat rusa, langkau, tembawang, tempat mengambil air tawar, kubur* and encroachment area and landmarks which are listed in the legend of the map. The topographic map was scanned, digitised and georeferenced with the field survey data for correlation and verification. After that he produced the final copy of the community map showing the NCR land of the plaintiffs. Two maps were tendered as exhs P7 and P8 (pp 47–48 BOD3).

[35] It should be noted that PW10 did not have any personal knowledge of the NCR claims of the plaintiffs. He depended on the plaintiffs to brief him on their NCR land. He did not testify in his witness statement that he had carried the field surveys of the perimeters of the NCR land claimed by the plaintiffs. He did not testify who were the villagers who assisted him in the field surveys or who pointed out the *pulau, kebun, tembawang* or *kubur* which he put in his maps. He did not give the dates and the length of the field surveys. He did not say that he also surveyed the areas planted by Felcra. Based on the area or size to be surveyed as stated in his maps, it would take more than two days to carry out and complete the field surveys. He did not explain any of these shortcomings and discrepancies. Based on their witness statement, PW1 did not testify that he went to the ground to do the field surveys with PW10. PW3 did not do the field surveys. Similarly, PW2, PW4, PW5, PW6, PW7, PW8 and PW9 did not in their witness statement testify that they went to the ground

to do the field survey together with PW10.

[36] Based on their witness statements, it was apparent that none of plaintiffs' witnesses had carried out any field surveys of the NCR land claimed by the plaintiffs as shown in exhs P7 and P8. Without any field survey carried out by PW10 together with some of the plaintiffs or the people of the kampongs being present to point out the boundary and features of the NCR land claimed, the maps prepared by PW10 could not be correct nor could they be used to substantiate the NCR claims of the plaintiffs.

[37] DW6 was an assistant surveyor attached to the Cartography Photogrammetry Section, Survey Branch, of L&S Department Headquarters, Sarawak. He was instructed to prepare two maps on the interpretation of the aerial photographs over the area of land claimed by the plaintiffs. He prepared two maps, one map for before the year 1958 and another for the year after 1958, which is the cut-off date prescribed in the Sarawak Land Code. He prepared the maps referred to as Appendix A and Appendix B based on aerial photographs taken in 1951 and 1962 respectively. During the trial the parties did not dispute the admissibility or the correctness of the aerial photographs or Appendix A and Appendix B.

[38] In Appendix A, the area of land claimed by the plaintiffs or referred to as the 'area of interest', which is shaded in green, which aggregated to 965.03 hectares, shows that in 1951 the area claimed by the plaintiffs was virgin jungle. The area claimed by Kg Semera, within the black polyline, approximated to 498.60 hectares. The area within the red polyline is claimed by Kg Jemukan which approximated to 397.17 hectares. The area within the blue polyline is claimed by Kg Terasi which approximated to 69.26 hectares.

[39] Based on aerial photographs taken in 1951, Appendix A did not show any yellow patches, which represent 'cleared areas', within the area of interest of the plaintiffs. This meant that up to 1951 the area had not been cleared for human settlement or farming. This contradicted the claims by the plaintiffs that their forefathers or ancestors had cleared and acquired NCR over the area of land prior to 1949 or many generations ago.

[40] DW6 testified that there was no aerial photograph of the area shaded in pink colour claimed by Kg Semera and this area approximated to 31.59 hectares. There was no evidence that this area had been cleared in or prior to 1951. There was no evidence that the plaintiffs and or their forefathers had cleared the said pink area amounting to 31.59 hectares as their NCR land. Appendix B, based on aerial photographs taken in 1962, shows there were some yellow patches of cleared area amounting to 3.53 hectares only. Comparing the two areas, namely 31.59 hectares and 3.53 hectares, the

plaintiffs could not have cleared or acquired the 31.59 hectares of land as their NCR land belonging to Kg Semera.

[41] Appendix B shows that in 1962 the area of interest claimed by the plaintiffs was still virgin jungle except for the cleared areas of 3.53 hectares. This again contradicted the plaintiffs' claims that they and their forefathers had cleared and acquired NCR over the area of interest prior to 1949 or many generations ago.

[42] Appendix A and B showed that in 1951 and 1962 respectively, the area of land claimed by the plaintiffs was virgin jungle which had not been cleared for human settlement or farming up to 1962 except for small patches of cleared areas amounting to 3.53 hectares only. Assuming that the plaintiffs cleared the 3.53 hectares, although there was no proof that they did so, this again contradicted their claims that they and or their forefathers prior to 1958 had cleared 888.7 hectares as pleaded or 965.03 hectares of land calculated by DW6 which they claimed to be their NCR land.

[43] Further, DW7, who was attached to the Licensing Division of the Forest Department, Sarawak, testified that a timber license No T/5087 was issued to Hua Lim Sawmill Bhd from 1 March 1971–1 March 1972 and that a timber license No T/5107, which replaced the previous timber license, was issued to Hua Lim Sawmill Bhd over the same area from 1 March 1972–30 April 2005. The timber licenses covered the same area claimed by the plaintiffs.

[44] DW7 said that based on their records, there was no claim made by the plaintiffs against the Forest Department or against any timber license holder for trespass to their claimed NCR land. If the plaintiffs have NCR over the area of land, they would or should have taken action against Hua Lim Sawmill for unlawfully extracted timber from their claimed NCR land and for trespass to their claimed NCR land. Since 1971 the plaintiffs did not take any action against Hua Lim Sawmill and or the second and third defendants in respect of the timber licenses and no explanation was given. This again raised doubts on their claims that they had acquired and inherited the NCR land.

[45] In order to verify the claims of the plaintiffs based on the ancient map and D-Book, DW8, a draughtsman with L&S Samarahan, was instructed to check the claims against their office records including copies of D-Book which he produced in court which were marked as 'A', 'B' and 'C'. DW8 compared these with the D-Book and ancient map produced by the plaintiffs and found that the D-book and ancient map produced by the plaintiffs were not the correct or exact copies of the records kept by the L&S. For example, the names Wan Ahmad and Hj Muhammad in the two parcels of land shown at the top of

A the ancient map and D-Book differed from their office copies which stated the names as Wan Ahmad bin Raja Daing and Hj Muhammad bin Hj Yusof.

[46] DW9 testified that based on the records of the L&S, there was no NCR created or acquired by the plaintiffs over the area of land claimed. He said the area was state land and some had been occupied by claimants. The parties referred to a letter dated 8 February 1996 from L&S to the first defendant giving approval for the first defendant to develop the three areas of land known as Asajaya Blok IV referred to in the letter. Paragraph 2.1 of the letter requested the first defendant to deal with the 319 claimants. The parties did not produce any name list of these 319 claimants and whether they included the plaintiffs. On evidence adduced, some of these claimants were approved and issued with land title (see pp 42–359 BOD2) and many of them were participants in the Asajaya Blok IV oil palm scheme and many parcels remain as state land.

[47] DW1, from Kg Jemukan, testified that in the 1970s the area was still jungle and undeveloped because of the communist threats at that time. He said with the encouragement of their YB, 46 of them entered to clear and farm some of the land which was subsequently surveyed by the L&S and they were given land title to the land claimed by them. He referred to Lot 38 Block 23 Sadong Land District which was issued to him and another.

[48] The parcels of land claimed by these 46 claimants are also claimed by the sixth to eighth plaintiffs as set out in para 4(b)(i) of the statement of claim. It should be noted that these 46 claimants cleared the land in the 1970s and not prior to 1 January 1958 but their application for land was approved. The area of land claimed by the 200 claimants represented by the fifth defendant is also claimed by the ninth to eleventh plaintiffs as set out in para 4(c) of the statement of claim.

[49] Based on a letter dated 16 March 1997, the father of PW1 applied for the area of land which they claimed they had cleared and farmed prior to 1949. They referred to an earlier letter dated 17 December 1994, which was not produced, applying for the area of land. The plaintiffs wrote further letters, for example 12 July 1997, 2 September 1998, 9 March 2004 and 25 April 2007. The plaintiffs did not produce any earlier letters. If they had cleared the land prior to 1949, there was no explanation why they did not apply earlier for the land and for the title to be issued and why waited until 1994 or 1997. As stated above, Appendix A and Appendix B contradicted the paintiffs' claims that they had cleared and acquired NCR over the area of land prior to or since 1949.

[50] Based on Appendix A, Appendix B, the testimony of DW9 and DW1, and the application letters made by the plaintiffs, the plaintiffs did not and could not have cleared and farmed the area of land claimed by them prior to 1

January 1958. The plaintiffs did not produce any permit to clear and farm the land in accordance to ss 5 and 10 of the Sarawak Land Code. Their application for the land has not been approved by the L&S or Sarawak Government.

[51] In respect of Lot 168 and Lot 169, both of Block 31 Sadong Land District, which are registered in the name of the fourth defendant, the plaintiffs did not sue or join the fourth defendant in this suit. Instead the fourth defendant applied to intervene to protect its interests in these two parcels of land. These two parcels of land were previously claimed by 65 villagers from Kg Jemukan. PW7, from Kg Jemukan Tengah, and PW8 from Kg Jemukan Laut are among the 65 claimants of Lot 168 and Lot 169. These contradicted the pleadings that these two parcels belonged to Kg Terasi. As stated above, PW10 testified that he was approached to do field surveys and to map the boundaries of the NCR land of Kg Jemukan, Kg Semena and Kg Terasi Iban. PW10 did not mention Kg Terasi or Kg Terasi Melayu.

[52] DW4 testified that in November 2006 he was approached by Mohamad bin Ismail concerning two parcels of land situate at Kawasan Ulu Jemukan, previously described as Lot 112 Block 31 and Lot 198 Block 24, Sadong Land District owned by Mohamad bin Ismail and 64 villagers of Kampung Jemukan. Mohamad bin Ismail claimed he had authority to deal with the land by virtue of a letter of representation dated the 8 November 2006. They entered into a deed of relinquishment and acquisition dated 30 November 2006 for a consideration of RM70,650. Subsequently the title was transferred to the fourth defendant and claimed that it has indefeasible title over the land.

[53] It should be noted that the dispute in respect of Lot 168 and Lot 169 was between the 65 claimants of these two parcels of land and not between the plaintiffs and the defendants. Some, including PW7 and PW8, claimed that Mohamad bin Ismail sold the two parcels to Wahab bin Ismail without their knowledge and consent. They denied receipt of their shares of the proceeds. PW7, PW8 and the 65 claimants are not plaintiffs in this suit and they have not sued Mohamad bin Ismail and others as defendants for fraud. Similarly the plaintiffs have not sued Mohamad bin Ismail and Wahab bin Ismail for fraud.

[54] On evidence adduced, on a balance of probabilities, the plaintiffs have failed to prove that their forefathers had cleared, farmed and acquired NCR over the area of land claimed and that they had inherited the NCR over the land claimed by them. They have failed to establish their case against the defendants and for the reliefs prayed for.

[55] In respect of the first defendant's counterclaim, the counterclaim was against the sixth, seventh and eighth plaintiffs only. The first defendant alleged

A that since 20 December 2012 the three plaintiffs together with their contractors, agents or representatives trespassed Lots 9–39 of Block 23, Lot 71 and Lot 72 of Block 24 and Lots 14–26 of Block 30, all of Sadong Land District and harvested and took FFB.

B **[56]** DW5, the administrative manager of the first defendant, testified that he was informed by the legal department of the first defendant that it has a counterclaim against the sixth, seventh and eighth plaintiffs. DW5 was based at the regional office of the first defendant at Jalan Dato' Mohd Musa, Kota Samarahan. He did not say that on 20 December 2012 he was present at the oil C palm plantation where he saw the sixth, seventh and eighth plaintiffs entered the plantation, threatened the workers of the first defendant and harvested and took the FFB from the plantation. DW5 did testify that since december 2012 that the three plaintiffs had trespassed, continued to trespass and continued to D harvest and took the FFB from the plantation. The first defendant including DW5 found out about these incidents from the workers at the plantation. Clearly from his witness statements DW5 did not have any personal knowledge of the trespasses, threats and harvestings. The first defendant did not produce any photographs or video recordings to establish that the sixth, seventh and E eighth plaintiffs and their contractors or agents had trespassed, threatened and harvested the FFB. DW5 did not testify how many bunches of FFB were taken, the value of these FFB and the losses sustained by the first defendant. The first defendant did not call any of its workers to establish that it was the sixth, seventh and eighth plaintiffs. Although the first defendant claimed for special F damages, it did not set out the special damages in the defence and counterclaim.

[57] On a balance of probabilities, the first defendant has failed to establish its counterclaims against the sixth, seventh and eighth plaintiffs.

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[58] In conclusion, the first to the fourteenth plaintiffs have failed to establish their claims against the first to the fifth defendants. The plaintiffs' claims against the defendants are dismissed. Similarly, the first defendant's H counterclaims against the sixth, seventh and eighth plaintiffs are dismissed.

[59] Based on the pleadings, the issues canvassed the numerous bundles of documents, the number of witnesses who testified and the length of the trial, the plaintiffs shall pay costs of RM20,000 to the first defendant, RM20,000 to I the third and fourth defendants, RM15,000 to the fourth defendant and RM15,000 to the fifth defendant. The plaintiffs shall also pay the allocatur.

Claim and counterclaim dismissed.

Reported by Afiq Mohamad Noor